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No. 89-1119

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PATRICK A. HERRING, JR., *et al.*,
Petitioners,

v.

DELTA AIR LINES INC. and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY MEMORANDUM

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The opposing briefs of respondents Delta Air Lines, Inc. ("Delta") and the Air Line Pilots Association, International ("ALPA") rest on four fundamental misstatements.

1. Delta and ALPA erroneously claim that the Ninth Circuit's decision below used the same standard set by 50 years of administrative and court interpretation of the LLPs. Delta admits (p. 7) that the traditional LPP standard is that "once there is an [seniority] agreement

between the collective bargaining representatives and the carrier, that agreement will not be set aside *absent a showing of bad faith or a breach of the duty of fair representation.*" *Citing Delta-C&S Seniority List*, 29 CAB 1347 (1959), *aff'd sub nom. Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960) (emphasis added). The decision below changed this well-established standard by eliminating the italicized exception. The court simply ignored appellants' claims of intimidation, coercion and other bad faith by the carrier, and ignored appellants' claim that the union breached the duty of fair representation by violating its own merger policies. Under the new Ninth Circuit standard, an agreement to arbitrate will not be enforced merely because an integrated seniority list exists, without regard to whether the list was the product of bad faith by the carrier or misconduct by the union.

2. Delta and ALPA erroneously argue that petitioners may not enforce Delta's promise to arbitrate under the plain terms of the LPPs because they were not a collective bargaining representative and, hence, did not constitute "either party" as specified in section 3 of the LPPs. This argument ignores section 13 of the LPPs which authorizes arbitration by "*any* party" for any dispute or controversy arising under the LPPs. The arbitration provision in section 3 adds to the types of disputes that may be submitted to arbitration under section 13, but it does not subtract from them. *American Airlines, Inc. v. CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972) (court upheld a CAB order of arbitration upon the petition of pilots who were not union representatives notwithstanding that union representatives had reached a seniority agreement with carrier). If Delta and ALPA were correct that the seniority list integration were arbitrable only where the union and company failed to agree on a "fair and equitable" list, then arbitration over the fairness of a list would not be available at all to classes or crafts of employees who were not unionized.

Delta and ALPA's argument is also inconsistent with the overall section 3 requirement that the seniority integration process be "fair and equitable." Since arbitration may be ordered upon a showing of bad faith or breach of a duty of unfair representation, employee representatives —other than union representatives—must have the right to make these bad faith allegations. Certainly, the union is not about to make bad faith allegations about itself. Also, the 660 petitioners in this case are the majority of the former Western pilots and clearly are appropriate "representatives of the employees affected" as required by section 3 for purposes of making bad faith allegations and securing arbitration if those allegations are proven. The agencies interpreting the LPPs have consistently stated that they would not consider that "representation for purposes of its labor protective provisions would necessarily be the same as the certified bargaining representative under the Railway Labor Act." *American-Trans Caribbean Merger Case*, CAB Order 71-5-30 at 3, n.6 (Docket 21828) (May 7, 1971).

3. Delta and ALPA erroneously claim that the May 28, 1987 signed seniority list was a product of collective bargaining. This misstatement permits them to argue that petitioners are seeking to upset a collective bargaining agreement in violation of national labor policy. In their briefs, neither Delta nor ALPA disputes petitioners' statement (Cert. Pet. at 15) that the two merger committees were not authorized to bargain with Delta.[1] Delta, in fact, characterizes (p. 3) its role simply as informing the two merger committees of Delta's views and in assisting the two committees to reach agreement. This is in stark contrast to its claim elsewhere that the list was the product of collective bargaining and is contrary to the

[1] With respect to the merger committee's authority, ALPA misleadingly quotes (p. 3) from its Merger Policy without making clear that the merger committees had authority only to reach agreement between themselves. As ALPA subsequently acknowledges (p. 3), an agreement with Delta could only be executed by ALPA National.

Ninth Circuit's erroneous characterization that "[a]fter strenuous negotiations, management reached an agreement with the union." (Petitioners' Appendix 3a.)

Similarly, neither ALPA nor Delta disputes petitioners' statement (p. 15) that in contrast to collective bargaining situations, the Western merger representatives had no economic leverage to resist Delta's furlough threats. The Western merger representatives, for example, were not authorized to call a strike or engage in the "major dispute" process under the Railway Labor Act. ALPA claims (p. 7, n.1) that the Western merger representatives could simply have decided not to sign the list, but this assertion begs the question of whether Delta's bad faith coercion eliminated this option.

Once it is accepted that the May 28, 1987 seniority list was not the product of collective bargaining, the legal arguments of ALPA and Delta disintegrate. Without the collective bargaining rationale, the coercion and intimidation exerted by Delta cannot be explained away or ignored (as in the decision below), the asserted sanctity of the May 28, 1987 list as a "collectively bargained" list disappears, ALPA's failure to protect the intra-ALPA negotiations from outside pressure in accordance with its own policies becomes apparent, and the reliance on collective bargaining to meet the "fair and equitable" [2] standard required by the LPPs is unavailable.

4. Delta erroneously argues that the case is unworthy of review because the court below merely applied a well-established standard to a unique set of facts. While the standard applied by the court was unique (and erroneous), the facts were not. Given the deregulation of airline mergers, it is likely that the incorporation of LPPs

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[2] Section 3 of the LPPs requires that seniority lists be integrated "in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected." (Petitioners' Appendix 25a.)

into merger agreements will be commonplace. The decision below provides an instruction manual for carriers on how to escape their LPP promise to arbitrate while dictating an unfair and inequitable seniority list which favors the pilots of the acquiring carrier. During the internal ALPA negotiations, the carrier need only threaten furloughs or other economic sanctions against a recalcitrant merger committee that has no bargaining power or authority, and incorporate the coerced seniority list into the collective bargaining agreement it subsequently signs with ALPA. This result not only is contrary to the national policy of enforcing agreements to arbitrate expressed in both the RLA and the FAA, it also invites labor strife in the national transportation industries.

Respectfully submitted,

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